AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF:

FRATERNAL ORDER OF POLICE,
LODGE 5

AND

CITY OF PHILADELPHIA

Grievance: Discharge of P/O Michael Paige
AAA Case No. 14 390 998 07 EG

OPINION AND AWARD OF ARBITRATOR

Hearing Date: October 21, 2008

Record Closed: January 5, 2009

Arbitrator: Thomas G. McConnell Jr.

Appearances:

For the FOP:

Bridget E. Clarke, Esq.

For the City:

Karen von Winbush, Esq.

PROCEDURAL HISTORY

This is a grievance arbitration proceeding involving the Fraternal Order of Police, Lodge 5 (FOP) and the City of Philadelphia (City). A hearing was held on October 21, 2008 in Philadelphia, Pennsylvania, at which time the parties were presented a full opportunity to present their cases. Briefs were then filed and the record was declared closed on January 5, 2009.

ISSUES

The parties were able to stipulate to the issues in this proceeding: Whether the City had just cause for the discharge of the grievant? If not, what shall the remedy be?

FACTUAL BACKGROUND AND PROFFERED EVIDENCE

General Background

The Grievant in this matter is Michael Paige. Just prior to the discharge at issue here, Mr. Paige, in his capacity as a police officer, was working in the 92nd District, which generally covers northwest, including some parts of Center City, Chestnut Hill, and Fairmount Park. Mr. Paige testified that the area he was assigned to was generally quiet during those hours, but that there were occasional rapes, auto accidents, stolen cars, and lewd behavior (couples having sex in vehicles).

Mr. Paige testified that his normal tour of duty was midnight to 8:00 a.m. On March 16, 2007, the record reflects he may have been working 10:30 p.m. to 6:00 a.m. At approximately 2:30 to 3:00 a.m., Mr. Paige encountered [redacted] and another individual referred to as [redacted] in the record, in a vehicle in a parking lot in Fairmount Park. Mr. Paige then approached the

vehicle and talked to [redacted] and [redacted] indicated that he did not have any identification, and [redacted] provided identification. Mr. Paige then directed [redacted] to come into the police vehicle, and Paige then briefly interviewed him, taking down information. Mr. Paige then told [redacted] to return to the other vehicle, and directed [redacted] to come into the police vehicle. Mr. Paige then interviewed [redacted] Mr. Paige attempted to do a background check on [redacted] but testified that he could not do so due to a mechanical error on the MDT. Mr. Paige then told [redacted] and [redacted] that they could leave, and they did so. Mr. Paige informed police radio that he had completed the car stop.

Comparison of Testimony: [redacted] and Mr. Paige

Aside from the facts just set forth, the testimony of [redacted] and Mr. Paige is different in most respects. I have set forth some of the more major differences below:

- **Testimony of [redacted]** When Mr. Paige first approached his vehicle, he [redacted] was sleeping. [redacted] was in the vehicle as well. Though they call themselves "cousins," they have no family relationship. [redacted] testified that that the part of Fairmount Park area they were in was a common gathering place for people to "party," and that he and [redacted] had been using marijuana that night.
- **Testimony of Mr. Paige**: When Mr. Paige first approached the vehicle, [redacted] was sitting on the lap of [redacted] with his pants down. According to this testimony, Mr. Paige then gave them time "to get themselves together" before he approached them.

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- **Testimony of** [redacted] At the time he first went into the police vehicle, to be interviewed, he gave Mr. Paige his registration and insurance card. [redacted] did not have identification, and his license was suspended at the time. [redacted] did provide his social security number and volunteered other information which might serve to confirm his identity. Mr. Paige engaged [redacted] n conversation designed to elicit whether [redacted] and [redacted] were a couple. Mr. Paige talked to [redacted] for approximately twenty to twenty five minutes, and then let [redacted] go. [redacted] first indicated in testimony that Mr. Paige gave him back his registration and insurance card before he left the police vehicle the first time. [redacted] later indicated in his testimony that Mr. Paige told him that he would have to come back to get his registration and insurance card, after taking [redacted] home first. When providing this later testimony, [redacted] testified that Mr. Paige told him not to tell [redacted] that [redacted] was coming back to the park.
- **Testimony of Mr. Paige**: At the time [redacted] went into the police vehicle, for the first time, to be interviewed, [redacted] did not have identification and Mr. Paige took down information regarding his identity. [redacted] then began to tell Mr. Paige his "life story," including the fact that the car was his grandmother's car, that he had to get up for work that morning, and that he was a construction worker, working with concrete. While talking with [redacted] Mr. Paige was attempting to run a background check via the MDT computer. However, for some reason he

could not process the entry. Mr. Paige then told [redacted] that he was "catching a break," due to the MDT problem, and that he should simply go home and not come back to the park. After Mr. Paige gave him back his papers, [redacted] expressed appreciation and then left the park with [redacted] Mr. Paige later filled out his 75-48, including the information [redacted] had provided. Mr. Paige called in to police radio, indicating he had completed the car stop. On cross, Mr. Paige acknowledged that he had had numerous vehicle stops like this in the past, and that "normal procedure" was to notify police radio upon first coming across the vehicle. On cross, Mr. Paige acknowledged that he could have written a citation for [redacted] and [redacted] for lewd behavior. On redirect, Mr. Paige indicated that it is not his practice to call for back up when encountering situations such as occurred that night. Mr. Paige indicated that there is a shortage of manpower and that typically these are non-emergency situations which do not require back up, and that therefore he only calls in to police radio when the stop is completed.

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- **Testimony of** [redacted] took [redacted] home, and then returned to the park to get his papers. [redacted] did call [redacted] before going back to the park, and indicated that he was going back to the park. Upon reaching the proper location in the park, Mr. Paige pulled up next to [redacted] then exited his vehicle, and approached Mr. Paige's vehicle. Mr. Paige then told [redacted] to turn off his engine and to return to the police car, which [redacted] then did. Mr. Paige then began driving the

car, approached a yellow fence and stopped to unlock a gate to get through. Mr. Paige could not open that lock and went to another gate, got out of the car, unlocked the gate, and got back in the car and drove through the gate, down the road a bit. [On cross, [redacted] acknowledged that Mr. Paige left the car running while he went to unlock the gate. [redacted] also acknowledged that at no time did he ask Mr. Paige "what was going on" or to stop the car]. Mr. Paige then stopped and pulled down his pants and underwear, after having taken his gun belt off. The gun belt was then on the floor, within possible reach of [redacted] Mr. Paige then put his hand behind [redacted] head and tapped his head with a couple of fingers, suggesting in [redacted] mind that Paige wanted oral sex. Mr. Paige then "pushed [redacted] a couple of times" and stared at [redacted] [redacted] then engaged in oral sex for a few seconds, or less than a minute, when Mr. Paige indicated he should stop, which [redacted] did. [redacted] testified that he felt threatened, given the circumstances, and did not say "no" to Mr. Paige or otherwise voice opposition to what Paige wanted. Mr. Paige then drove down the road a little further, during which time they passed a white van which was parked, which may or may not have had anyone in it. Mr. Paige then drove to a wooded area and stopped. Mr. Paige then looked at [redacted] and [redacted] perceived that he wanted [redacted] to continue giving Paige oral sex, which he did. Mr. Paige then ejaculated after about two minutes, at which time Mr. Harris then spit some of the semen outside the door. Mr. Paige then gave [redacted] a tissue and [redacted] wiped himself with it, and

threw it outside the car. Mr. Paige told [redacted] to put the tissue back in the car, which [redacted] then did. [redacted] testified that, on one of the occasions he was engaging in oral sex, Mr. Paige stuck his hand down the back of [redacted] pants and began to touch his anus. [redacted] then tightened up, indicating opposition, and Mr. Paige then stopped the attempt. Following the oral sex, Mr. Paige then got out of the car, and urinated in a spot near the car. During that period of time, Mr. Paige left his gun belt in the car. Mr. Paige then got back in the car, and put his gun belt back on. A conversation then ensued. [redacted] told Mr. Paige that his mother [redacted] mother) [redacted] and Paige then indicated that he (Paige) was on the Police Advisory Board. [redacted] told Mr. Paige that he went to the gym regularly, and could bench press 275 pounds. Mr. Paige responded that he worked out regularly and to come see him when [redacted] "reached the 300 club." Mr. Paige also told a story about an incident involving Paige and a number of other police officers, where unnamed newspaper coverage alleged that the officers were "murderers." Mr. Paige stated that his mother stated that, "if you killed them boys, you should go to jail," but that Paige responded to his mother, "I wouldn't kill nobody if they didn't deserve to be killed." [redacted] finally asked Mr. Paige for his phone number, and Paige then told [redacted] to give Paige his number, which [redacted] did. Mr. Paige immediately dialed the number, possibly wanting to test whether it was really a correct number, and [redacted] cell phone then rang. [redacted] saved the number under the name Bub. Mr. Paige indicated that he should use this name.

Mr. Paige finally drove [redacted] back to the original location, where [redacted] car was parked. [redacted] got out of the police car, and then left in his own vehicle. As [redacted] was leaving, he spit into a cup which was in the front seat.

- **Testimony of Mr. Paige**: Sometime after [redacted] left the site, after Mr. Paige had told him not to come back, [redacted] returned. Mr. Paige then pulled up to his car, and a conversation ensued. [redacted] indicated that he was thankful for the way Mr. Paige had treated him previously, and further indicated he had some more things he [redacted] would like to discuss. Mr. Paige was used to mentoring people and so used this opportunity to mentor [redacted] During the ensuing conversation, Mr. Paige asked why he was involved in "that life," apparently referring to a gay lifestyle. [redacted] responded that he had been molested by an uncle, when he was younger. Mr. Paige then asked if [redacted] had a girlfriend, and [redacted] responded in the affirmative. After a few minutes of conversation, during which [redacted] was not in the police car, Mr. Paige then indicated he had to make "his run," referring to patrolling the area. [redacted] then indicated he had some more things he wanted to run by Mr. Paige and Paige then invited [redacted] to accompany him on the patrol run, and [redacted] then got in the front seat of the car. During the run, [redacted] asked if he had ever killed anyone, and Mr. Paige indicated that he had not. Mr. Paige did describe the circumstances of one case, where a group of officers were labeled "killers" in the newspapers after an individual died in police custody. During the run, [redacted] indicated

that he worked construction, and worked with concrete. Mr. Paige responded that he needed some help with some concrete work, apparently referring to his house. Mr. Paige indicated that he could provide [redacted] with tips on working out, and further indicated that he could bench press 315 pounds. [redacted] responded that he could bench press somewhere between two and three hundred pounds. During the course of the ride, Mr. Paige did take [redacted] to a deserted area, after unlocking a gate. Mr. Paige stressed that "only cops go back there" and that [redacted] should not ever go back there. During the course of this part of the ride, Mr. Paige bragged about having sex on different occasions with several women, in the area in which they were riding. Mr. Paige pointed out areas where he had had such sex. Mr. Paige intimated in his testimony that he had left used condoms at the scenes of such sexual activity. Finally, Mr. Paige took [redacted] back to the initial location, and advised [redacted] that he better get home so that his grandmother would have the car. Mr. Paige then got [redacted] phone number, so that there could be discussion about the possibility of the concrete work. Mr. Paige never propositioned [redacted] for sex and never had sexual activities with [redacted] that night. The areas Mr. Paige drove to that morning were not out of his patrol sector. On cross, Mr. Paige acknowledged that he did not normally bring unauthorized citizens with him during his patrol duties.

[redacted] **Complaint and the Internal Affairs Investigation**

After getting home from the park, [redacted] went to sleep. Upon waking, [redacted] wanted to file a complaint that Mr. Paige had sexually assaulted him. He then called a police station, and was told to come in to the station. He may also have called the DA's office. [redacted] then began calling attorneys, "for his protection." [redacted] then testified that, on Monday, March 19, 2007, he finally talked to someone at the DA's office, who referred [redacted] to Internal Affairs.

Lieutenant Frederick Karcher has worked for Internal Affairs for six years. Lieutenant Karcher was assigned to investigate [redacted] complaint on or about March 19, 2007.

Lieutenant Karcher testified that [redacted] was initially reluctant to fully participate in an investigation, but that [redacted] did ultimately agree to be interviewed. Lieutenant Karcher interviewed [redacted] three times. In the second interview, [redacted] mentioned that he had spit into a cup, and Lieutenant Karcher asked if he still had the cup. Lieutenant Karcher later found the cup in the backseat of [redacted] car, and the lieutenant confiscated the cup and turned it over to a DNA specialist. Lieutenant Karcher also obtained a swab sample from [redacted] and Mr. Paige (Mr. Paige's pursuant to a search warrant) so that the forensic lab could use them for an analysis.

During the course of the investigation, Lieutenant Karcher also obtained an assignment shift for Mr. Paige for the night in question, the 75-48 for the car stop on the night in question, radio transmittals, radio tape with regard to the car stop, and phone records from Mr. Paige and [redacted] cell phones. The

assignment sheet reflected that Mr. Paige was working Fairmount Park on March 16-17, from 10:30 p.m. to 6 a.m. Lieutenant Karcher and a sergeant also transported [redacted] to Fairmount Park, where [redacted] then showed Karcher where the assault allegedly occurred. From assessment of the information he had gathered in the investigation, Lieutenant Karcher was able to determine that Mr. Paige did make a car stop of [redacted] that night; that Mr. Paige put partial information into the MDT, including [redacted] social security number and date of birth; and that Mr. Paige notified police radio when the car stop was completed.

On cross, Lieutenant Karcher testified that he did not review [redacted] criminal record in the investigation, as he was not investigating [redacted] In reviewing [redacted] court history, entered as FOP Ex. 3, Lieutenant Karcher testified that, as of March 16, 2007, [redacted] had three outstanding criminal charges, including one for controlled substance, driving under the influence of alcohol or controlled substance, and possession of marijuana. [redacted] also had a bench warrant for DUI.[1] Referred to FOP Ex. 3, Lieutenant Karcher testified that [redacted] has a felony conviction, resulting from a guilty plea on drug distribution.

During the course of the investigation, Lieutenant Karcher presented [redacted] with a photo array of eight individuals, including Mr. Paige, and [redacted] identified Paige as the person his complaint concerned.

[1] As a factual matter, all the charges against [redacted] were withdrawn after his complaint against Mr. Paige was filed. The FOP urges that an inference should be drawn that the withdrawal of the charges was precipitated by the filing of the complaint, and that [redacted] had motivation to file a false complaint in order to have this resolution of his criminal charges. The City urges that there is no plausible inference which can be drawn that the criminal charges were withdrawn due to [redacted] complaint against Mr. Paige.

Lieutenant Karcher concluded that Mr. Paige had assaulted [redacted] on the night in question, and that he was on duty while doing so. Mr. Paige was given the opportunity to answer questions, which he declined to do (criminal charges were pending), and the Police Commissioner then made the decision to discharge Mr. Paige. Mr. Paige was found "not guilty" in a criminal trial, and was not interviewed after that, as he had already been discharged.

Patricia Lane is a criminalistics technician working for the Philadelphia Police Department Forensics Science Bureau. Ms. Lane was involved in analyzing the Styrofoam cup and straw which Lieutenant Karcher seized from [redacted] car [property receipt entered as FOP Ex. 8]. Ms. Lane testified that a semen analysis and saliva activity analysis was conducted on the cup and straw. Ms. Lane testified that seminal stains containing spermatozoa were observed on Area A, which is the inside bottom of the Styrofoam cup and Area C, which is on the inside of the Styrofoam cup. No spermatozoa were observed on microscopic examination on Area B, which is the inside middle of the cup, and Area B, which is the bottom of the straw.

Ms. Lane testified that chemical analysis of Areas A and B of the cup, the inside bottom and inside middle, detected amylase activity consistent with saliva, or "spit," present there. Ms. Lane also provided testimony in support of City Ex. 9, an Amended Criminal Lab Report. Ms. Lane indicated that the only amendment was that the items were taken from a "vehicle" rather than a "police vehicle."

On cross, Ms. Lane acknowledged that she made no determination as to whom the spermatozoa or saliva belonged to. Ms. Lane also acknowledged

that she made no determination as to when the spermatozoa was emitted or created.

Benjamin Levin is Forensic Scientist II in the City Police Department's DNA Identification Laboratory. Mr. Levin provided testimony in support of City Ex. 10, a DNA Lab Report. Mr. Levin testified that he performed an analysis of certain samples: a swab from inside the Styrofoam cup; a buckle swab taken from the inside of Mr. Paige's mouth; and a bucket swab listed as confidential.

Mr. Levin testified that the analysis performed showed, within a reasonable degree of medical certainty, that the sperm fraction of the swab, which was taken from the Styrofoam cup, originated from Mr. Paige. Mr. Levin further concluded that, within a reasonable degree of medical certainty, the majority of the DNA within the second sample contained saliva, and came from the person who was listed as confidential [redacted]

POSITIONS OF THE PARTIES (IN BRIEF)

The City's position may be summarized as follows:

- The evidence is clear that the Grievant engaged in on-duty sexual contact with [redacted] and lied about it, continually, up to and through his testimony at the arbitration. The sexual contact was conclusively established by the DNA evidence, which was wholly unrebutted. [redacted] also provided credible evidence that he was sexually assaulted by the Grievant.

- The scientific evidence presented by Ms. Lane and Mr. Levin, from the City's Police Department forensics laboratory, conclusively establishes that there was sexual contact between the two men. Simply put, the semen found in the cup, taken from [redacted] car, matched the DNA sample provided by the Grievant. This testimony is wholly unrebutted by the FOP.

- The Grievant's explanation as to how his own semen ended up in the cup—that [redacted] might have drained it out of a used condom he could have found lying on the ground—is wholly unworthy of belief.

- The fact that there was semen found in the cup strongly supports the credibility of [redacted] since he told the truth that there was sexual contact between he and the Grievant, while the Grievant lied. The Grievant's explanation for his interaction with [redacted] that he was strictly attempting to mentor [redacted] so that [redacted] might "get his life together," should be rejected as utterly implausible.

- Taken as a whole, the evidence establishes that the Grievant sexually assaulted [redacted] This is established first by [redacted] testimony concerning the assault, in which he detailed his unwillingness to engage in sexual activity with the Grievant and the pressure and coercion the Grievant exerted to force him to do so. Unlike the Grievant, [redacted] had no reason to lie about his account.

- The Union's suggestion that [redacted] invented this story to avoid criminal charges is nothing more than a smokescreen designed to hide the Grievant's obvious misconduct. Simply put, [redacted] did not and could not invent the Grievant's semen, the existence of which has been scientifically proven. Moreover, the Union has not presented a plausible theory as to how or why [redacted] would believe that reporting a sexual assault by a police officer would somehow result in the dismissal of criminal charges pending against him. Thus, the unwarranted attempt to blame the victim here should be rejected out of hand.

- There is absolutely no basis to disbelieve [redacted] testimony that he was assaulted by the Grievant. The Grievant's admission that he had previous sexual activity while on duty in Fairmount Park also supports the testimony of [redacted] The Grievant's conduct illustrated a total disregard for his position.

- The arbitrator is invited to read arbitral opinions which stand for the proposition that grievants who have been discharged have a ready motive to lie. In contrast, the FOP's only theory as to why [redacted] would lie—namely, that his criminal charges would go away—is simply not a persuasive argument.

- [redacted] noted repeatedly during his testimony that he did not want to be with the Grievant, and that the oral sex he performed on the Grievant was not voluntary, but the result of coercion. The testimony provided by [redacted] was not the testimony of an individual who was being mentored, but the testimony of a victim of the most horrendous acts.

- A fair assessment of the overall evidence results in the conclusion that the Grievant committed a sexual assault against [redacted] while on duty and in a police vehicle. There can be little question that, in engaging in this conduct, the Grievant violated Section 1.75 of the Disciplinary Code, in that he engaged in conduct demonstrating that he had little or no regard

for his responsibilities as a member of the Police Department. Discharge was not only consistent with just cause, but the only option the City had under these extraordinary circumstances.

The FOP's position may be summarized as follows:

- Turning first to the allegation that the Grievant failed to complete a proper investigation, aside from possibly notifying police radio when Grievant made the initial stop, the City failed to explain how he could have responded differently. For example, the Disciplinary Notice fails to explicitly explain how the Grievant could have "discovered that the complainant [redacted] did not have a valid driver's license." Though there is other language in the Notice of Dismissal suggesting that the Grievant should have run [redacted] name into the MDT system, this language is not clear and the City produced no testimony on this point. In any event, the record makes it clear that the Grievant attempted to enter [redacted] name into the MDT system, but the system was not working properly. The City offered no other explanation as to how the Grievant could have learned that [redacted] did not have a valid driver's license, and also offered no testimony concerning the "Live Stop" program. The City also failed to substantiate the allegation that it is the Police Department's Policy for officers to automatically notify police radio when a stop is initiated. The Grievant provided credible testimony that, due to shortage of manpower, this is only done when an officer feels threatened, and thus feels he or she needs backup.

- As to the allegation that the Grievant had a sexual encounter with [redacted] the fact is that the Grievant had benevolent intentions to help a troubled individual, and attempted to mentor [redacted] that night. [redacted] a cunning and savvy criminal, then took that opportunity to concoct a story that the Grievant sexually assaulted him. As [redacted] anticipated, his lies then served to assist him in having outstanding criminal charges withdrawn, and in filing a civil action. It is evident throughout the record that [redacted] will lie without hesitation if he thinks it can be of any assistance to him.

- Despite [redacted] ease with lying, he was not always good at lying, as he slipped up in his testimony that the Grievant told him he would have to come back to the park to get his registration and paperwork, after he took [redacted] home. [redacted] first testified that the Grievant actually gave back his paperwork before [redacted] left the park the first time, and then only through prompting from City counsel did [redacted] realize that he forgot to include an important part of his concocted tale. [redacted] later had to be prompted again when he failed to mention his allegation that, during oral sex, the Grievant also attempted to touch [redacted] anus.

- If in fact a sexual assault occurred, then there are many facets of [redacted] testimony which simply make no sense. This included the "small talk" [redacted] testified took place after the alleged act, including discussion of weight lifting and police work. Though [redacted] felt that he felt threatened, and remained afraid even after the alleged assault, it makes no sense that someone in that state of mind would then ask for the Grievant's phone number. Though [redacted] claimed he was attempting to appease the Grievant in the aftermath of the alleged assault, [redacted] claim that he then indicated his mother was [redacted] seems to fly in the face of an attempt at appeasement. This sudden act of defiance simply makes no sense. The "small talk" and exchange of numbers is simply incompatible with an allegation that nonconsensual sexual conduct occurred moments earlier. It is just another indication that this conduct never took place and was invented by [redacted]

- When viewed in the light of all the testimony presented, it is highly implausible that [redacted] would have had enough detectable semen in his mouth (based on his version) after spitting at the scene of the alleged assault and then having had an extended discussion with the Grievant before returning to his car. More likely, [redacted] picked up one of the Grievant's used condoms from past encounters and conveniently poured it into the cup when he got back to his car.

- Even assuming that sexual activity did occur, the evidence shows that it was a consensual act. The overall circumstances demonstrate conclusively that [redacted] was a willing passenger who was not being held captive. Even accepting [redacted] account as true for the moment, there is nothing in that account which indicates that the Grievant pressured [redacted] into giving oral sex; in fact, according to [redacted] account the Grievant never even asked for oral sex. Read fairly, the record shows that the Grievant presented [redacted] with an opportunity and [redacted] embraced it not once but twice. Throughout the entire episode, [redacted] had several opportunities to escape if he really was being coerced, and also had access to the Grievant's gun during and after the alleged oral sex. It simply makes no sense that [redacted] was an unwilling actor in this story.

- Even accepting that voluntary sexual activity took place here, the City had no power under Section 1.75 of the Disciplinary Code here to dismiss the Grievant. Arbitral precedent between the parties establishes that, to fall within the purview of "repeated violations" and "course of conduct' under Section 1.75, there must be multiple acts of misbehavior. Yet the facts here indicate at best a brief, one-time sexual tryst while on duty.

- Should the arbitrator find that voluntary sexual activity took place here, then the facts would be extremely similar to those in the *Jones* award issued by Arbitrator Schick. In that award, Arbitrator Schick found that the grievant's one isolated incident of sexual misadventure did not violate

Section 1.75 of the Disciplinary Code (the arbitrator did reduce the discharge to a suspension based on other sections of the code not at issue here). Applying Arbitrator Schick's reasoning here, there is no just cause for a Section 1.75 violation.

- Even if this arbitrator were to find that the Grievant's alleged conduct falls within the purview of Section 1.75, the arbitrator here is invited to look at a 1995 award issued by Arbitrator Skonier, in which the arbitrator issued a thirty-day suspension to a grievant who had engaged in a sexual encounter while on duty. Likewise, Arbitrator Lang issued a thirty-day suspension to a subordinate officer involved in the same incident. Neither Arbitrator Skonier nor Arbitrator Lang was confronted with the issue as to whether a police officer could only violate Section 1.75 through multiple acts of misconduct.

- Finally, during negotiations the City proposed an amendment to the charge of "Conduct Unbecoming" under the Disciplinary Code. Specifically, the City sought to add a charge of "[s]exual behavior while on duty," with a penalty of fifteen days to dismissal. To date, the City has not achieved this amendment in negotiations, and now seeks to obtain through this arbitration what it has not been able to achieve in negotiations.

- In sum, even if sexual activity took place between the Grievant and [redacted] there is no just cause for dismissal here. The grievance should be sustained and the requested remedy granted.

DISCUSSION

The grievant in this matter is Michael Paige. Before the discharge at issue here, the notice of which was issued on May 24, 2007, Mr. Paige had served as a City police officer for seventeen years. Mr. Paige has also served in the military, and was deployed to Desert Storm in 1991, Bosnia in 2002-03 and Iraq in 2004-05. At the time of the hearing in this matter, Mr. Paige was serving in the military, as a drill sergeant.

Mr. Paige was discharged based on Section 1.75 of the Disciplinary Code, which provides for a penalty of 30 days to dismissal for "[r]epeated violations of Departmental rules and regulations, and/or any other course of

conduct indicating that a member has little or no regard for his/her responsibility as a member of the Police Department."

The Notice of Dismissal cites conduct occurring on the early morning of March 17, 2007, as the basis of the dismissal. Specifically, the Notice alleges that, in making a police stop of two individuals, Mr. Paige did not enter the name or "other information" of [redacted] one of the individuals, into the MDT System; failed to notify police radio of the stop, which would have resulted in back-up being sent; failed to complete the investigation properly, which would have resulted in citations being issued and the car being confiscated under the Live Stop program; told [redacted] to take his passenger home and to return to get his paperwork; upon [redacted] return, told him to get into the car, and then drove him to a remote location where Mr. Paige made it clear to [redacted] that he wanted oral sex; and that [redacted] then performed oral sex on Mr. Paige on three occasions, and that during the third time Paige ejaculated; and that during the course of events Mr. Paige also put his finger down [redacted] pants and touched his anus.

The evidence makes it clear that [redacted] did perform oral sex on Mr. Paige on March 17, 2007, sometime between 2:30 a.m. and 5:00 a.m. Though this is denied by Mr. Paige, the DNA test results of sperm found in a Styrofoam cup [redacted] spat into after the oral sex, when combined with [redacted] testimony, proves that such oral sex took place. I have also credited [redacted] testimony that Mr. Paige put his hand down the back of [redacted] pants, and then touched [redacted] anus. Mr. Paige ceased this attempt when [redacted] indicated opposition to this activity through body language.

I am in complete agreement with the City that Mr. Paige's testimony, in which he urges me to believe that he took [redacted] in the car with him only to "mentor" him, is utterly incredible. Likewise, I am not persuaded by Mr. Paige's story that the DNA test results, which indicate that his sperm was found in [redacted] Styrofoam cup, along with [redacted] saliva, can be explained by the fact that [redacted] must have found one of Paige's used condoms from one of his previous encounters with women in the park, and presumably then squeezed the ejaculate from that condom into the cup. This was simply a desperate attempt on Mr. Paige's part to counter evidence which is completely damning to his position on the issue as to whether a sexual encounter actually occurred.

The more difficult question relates to whether the sexual encounter between Mr. Paige and [redacted] was consensual, or whether as [redacted] claims this was a sexual assault. A third possibility is that the sex was consensual, but that Mr. Paige used the authority of his badge to leverage the situation, even perhaps "cutting [redacted] a break" in return for sex.

Before the sexual encounter took place, [redacted] came back to Fairmount Park after [redacted] had taken his friend [redacted] home. Although his testimony was equivocal on this point (which will be further discussed below), [redacted] alleges that Mr. Paige instructed him to drop off [redacted] and then to come back to get his registration and insurance papers. Mr. Paige testified that, when he released [redacted] and [redacted] he (Paige) gave [redacted] his registration and insurance papers, and told him to leave and not to come back. Both [redacted] and Mr. Paige testified that Paige told [redacted] at some point

that it was his "lucky day" as due to an apparent malfunction Paige could not enter [redacted] information on the MDT system to do a background check.

Given the fact that [redacted] had an outstanding bench warrant, criminal charges pending, and had no valid driver's license, it seems very likely to me that, if he had no other reason to come back (i.e., to get his registration and insurance information), [redacted] would have indeed felt it was his lucky day and would not have returned to Fairmount Park. Thus, it seems to me that he either returned because he was made to feel at ease regarding returning, in the conversation with Mr. Paige, or Paige was seeking to leverage the situation by forcing Mr. Paige to return to get his paperwork. It is also possible that, if Mr. Paige insisted on [redacted] coming back to get his paperwork, Paige could have been buying time to see if he could get the MDT to work properly. However, Mr. Paige provided no testimony which would support this latter theory.

When first asked on direct examination whether Mr. Paige gave him back his paperwork, before [redacted] took [redacted] home, [redacted] first testified that Paige did give him back his paperwork. Later on direct, counsel for the City skillfully attempted to repair this damage, and [redacted] then indicated that Mr. Paige told [redacted] to come back to get his paperwork, after he dropped [redacted] off at home.

I do not believe that [redacted] first testimony on this point was an innocent error, as it very clearly followed several questions concerning activity before he first left the park. And it was quite clear to me that [redacted] fully recognized the importance of that testimony, in relation to the backdrop for [redacted] argument that a sexual assault later occurred. I have not credited [redacted]

[redacted] testimony that Mr. Paige told [redacted] to come back to get his paperwork. Instead, I believe that Mr. Paige and [redacted] made an arrangement for [redacted] to return after [redacted] took [redacted] home. While it is difficult to find as fact that Mr. Paige and [redacted] expressly talked about having sex at that point, I believe that both men understood what [redacted] return would likely mean.

As to the issue of the sexual encounter, [redacted] alleges that upon his return to Fairmount Park, Mr. Paige directed him to get in the police car, and that he did so. [redacted] also alleges that Mr. Paige then drove to an isolated area and that Paige then pulled down his pants and made it clear what he wanted. [redacted] testified that, given the circumstances, he was afraid for his life, and that the subsequent oral sex he performed was the result of coercion.

Mr. Paige testified that, upon [redacted] return to Fairmount Park, [redacted] thanked him for the manner in which Paige had treated him earlier, and that [redacted] then sought further advice. Mr. Paige indicated that he had to proceed to patrol the area, and that he then let [redacted] come along on patrol. Mr. Paige then testified that he proceeded to mentor [redacted] something he regularly did in the military and in his personal life. Mr. Paige testified that nothing untoward happened during the patrol, during which they did go into an isolated area, an area Paige bragged about having had previous sexual encounters with women. Mr. Paige testified that ultimately asked for [redacted] phone number, due to the fact that Paige might need to call him to ask for help with some concrete work he needed to have done (Paige testified that [redacted] had told him he did concrete work for a living).

In considering the credibility of the witnesses, I have already found that Mr. Paige lied on the issue of whether a sexual encounter occurred. Of course, this lie must be assessed on the issue of sexual assault as well. At the same time, Mr. Paige lie in relation to the sexual encounter does not automatically result in the conclusion that he engaged in a sexual assault, or that he used his authority as a police officer to leverage the situation. Though by the time of the arbitration hearing Mr. Paige was no longer in jeopardy under criminal law, he obviously still had motivation to lie to protect his job, and as a married man obviously he had motivation to protect his marriage by lying.

I have already discredited [redacted] testimony as to why he came back to the park. In addition to this issue, there are other problems relating to [redacted] credibility. As an example, while he testified at the arbitration hearing that he was sleeping when Mr. Paige approached his vehicle, [redacted] told Internal Affairs that he was going to kiss his friend [redacted] when Paige approached. [redacted] testified on cross that he and [redacted] were not a couple, but he told Internal Affairs that they were "kind of" a couple, and as stated that they were going to kiss when Mr. Paige approached them on the night in question. Given these discrepancies in [redacted] testimony, I am inclined to credit Mr. Paige's testimony that [redacted] and [redacted] were involved in a sexual encounter when Paige approached them in his police car. While it is not entirely clear to me why [redacted] would lie on this issue, the fact is that he did lie.

Though I am mindful that a victim of sexual assault would likely be very nervous in delivering testimony, in determining whether [redacted] was such a victim I was not impressed with [redacted] demeanor and his testimony

left me with substantial doubts that Mr. Paige coerced [redacted] into performing oral sex. The casual conversation which occurred after the sexual encounter, and the fact that Mr. Paige voluntarily logged his cell phone number into [redacted] cell phone by calling him, also strikes me as unlikely if in fact a sexual assault occurred.

Finally, in terms of motivation to lie about a sexual assault, at the time of the hearing [redacted] still had the option of filing a civil action. Though it is a less compelling argument, I also give some weight to the FOP argument that [redacted] could have felt (whether correct or not) that a charge of sexual assault might create an environment for more favorable disposition of his pending criminal charges. I therefore find that the City has not met its burden of proving that a sexual assault occurred.[2]

There remains the issue as to whether Officer Paige's misconduct equates with a "course of conduct" under Section 1.75 of the Disciplinary Code, and if so, what penalty should attach for such conduct under just cause principles. It is worth repeating at this juncture that Section 1.75 provides for a disciplinary range of 30 days to dismissal for "*repeated violations* of Department rules and regulations, and/or any other *course of conduct* indicating that a member has little or no regard for his/her responsibility as a member of the Police Department." (emphasis mine).

The City's argument here relates not to the "repeated violation" language of Section 1.75, since there is no allegation here that Mr. Paige had

[2] Although I have found on the facts that no sexual assault occurred, it should also be noted that the Notice of Dismissal itself does not specifically allege that a sexual assault took place.

engaged in other such violations in the past. The focus of the inquiry therefore is directed at whether the City has proven that, on March 17, 2007, Mr. Paige engaged in a "course of conduct" indicating that he "has little or no regard for his/her responsibility as a member of the Police Department."

Several arbitrators have rendered an opinion on the parameters for determining whether a "course of conduct" exists. In *FOP, Lodge 5 and City of Philadelphia*, AAA Case No. 14 390 757 97 (Arbitrator Price, 1998) (*Simpkins*), Arbitrator Price considered a set of facts whereby the grievant had pumped himself 6.1 gallons of free gas at a rental car facility at which he previously worked, along with washing his car there while off duty. Arbitrator Price concluded that this did not represent a "course of conduct" under Section 1.75, since this was a "single, one-time occurrence."

Arbitrator Price provided the same analysis in relation to the interpretation of "course of conduct" in *Fraternal Order of Police, Lodge 5 and City of Philadelphia*, AAA Case No. 14 390 2131 96 A (*Ferreria*). In that opinion, Arbitrator Price concluded that the grievant improperly used, handled or displayed a firearm, but that since this happened only once there was no proof of repeated violations or a course of conduct which could have brought Section 1.75 into play.

More recently, Arbitrator Schick expressly agreed with Arbitrator Price in *FOP, Lodge 5 and City of Philadelphia*, AAA Case No. 14 390166 06 (Arbitrator Schick, 2006) (*Jones*), a case in which the City proved that an officer was engaged in a sexual encounter while on duty. Arbitrator Schick concluded

that this was an "isolated incident" which therefore did not "fall within the penumbra" of Section 1.75.

Arbitrator Das, discussing Arbitrator Price's interpretation of Section 1.75 in *FOP, Lodge 5 and City of Philadelphia*, AAA Case No. 14 390 633 99 (Arbitrator Das) (*Hoesle*), stated that Arbitrator Price's interpretation of "course of conduct" was "unduly restrictive" in that it forecloses the use of Section 1.75 where a single, grave act of misconduct occurs.

The interpretation of "course of conduct" was also a source of discussion in *FOP, Lodge 5 and City of Philadelphia*, AAA Case No. 14 390 235 01 (Arbitrator McConnell, 2002) (*Couvertier*), where I upheld a discharge based on the conclusion that the grievant had engaged in a "course of conduct" which warranted a finding of conduct unbecoming under Section 1.75. In finding that a course of conduct existed, I relied upon the fact pattern in that particular case, which included the fact that the grievant was driving with a blood alcohol content of at least .16; smashed into a group of parked cars while going the wrong way down a one-way street, causing substantial damage, and then fled the scene of the accident after having caused additional damage to the vehicles; continued driving with the headlights no longer operational, and the front hood pushed up where it is doubtful the grievant could even see through the front windshield; drove in a lane for oncoming traffic; briefly struggled with police officers when arrested; and provided several false names to police officers when he was arrested. Ultimately, the grievant in that case pleaded guilty to reckless driving and leaving the scene of an accident (the more serious charge of DUI was dismissed on procedural grounds). Given the fact pattern, and the grievant's inability to accept

responsibility and demonstrate sincere remorse, I stated that it was unnecessary to determine whether I agreed with Arbitrator Price or Arbitrator Das regarding the proper interpretation of "course of conduct."

In once again having the opportunity to evaluate Section 1.75, it is noted that the first part of Section 1.75 refers to "repeated violations," with a conjunctive/disjunctive (and/or) reference to "course of conduct." Given that the first part is more directly related to the sheer number of violations, it stands to reason that the second part, relating to "course of conduct," does not require proof of "repeated violations," though repeated violations could also result in a finding of a course of conduct. Instead, it seems to me that the "course of conduct" language is directed more at the nature and severity of an ongoing fact pattern.

In order to prove a "course of conduct" it is my opinion that the City must prove that there was continuing or interrelated conduct within a given fact pattern which demonstrates that the officer has little or no regard for his/her status as a member of the Police Department. Though I agree that an isolated incident is not enough to prove a course of conduct, I also believe that whether a given fact pattern represents an isolated incident is a subjective determination, one which must be made within the circumstances of a given case. I also find that, in order to prove a violation under the "course of conduct" language, the City need not necessarily prove multiple violations of the most serious misconduct (e.g., on duty sexual encounter). Rather, the entire sequence of events may be examined to determine whether there is a "course of conduct" which may be considered serious enough to warrant a finding of conduct

unbecoming. In assessing whether there is such a violation, it is my opinion that the continuing or interrelated conduct may occur over a long period of time, or a very short period of time.

In this case, I am convinced that Mr. Paige did not fulfill his duties as a police officer even before we get to the issue of the sexual activity. Mr. Paige conceded on cross that protocol called for him to call police radio upon making the stop.[3] I have found as fact that Mr. Paige, who could have issued a citation to [redacted] in relation to lewd behavior, instead had a discussion with [redacted] which led to [redacted] return to the park, and the subsequent sexual activity. In a violation of procedure, Mr. Paige then permitted [redacted] to get in the front seat of his car, and transported [redacted] to an isolated area for sexual activity. The oral sex was initiated in one location of the isolated area (although within his patrol sector), and then continued after Mr. Paige drove to another part of the isolated area. As noted in the Notice of Dismissal, Mr. Paige removed his gun belt before the oral sex was performed on him, and Mr. Paige's gun belt was on the floor, within reach of [redacted] The gun belt remained within [redacted] reach when Mr. Paige got out of the car to urinate. Whether or not [redacted] could actually do anything with the gun, had he decided to reach for it, I cannot imagine that any police training would suggest that this is preferred protocol.[4]

The sexual activity itself occurred while Mr. Paige was on duty, and supposed to be in a position to safeguard the lives and property of the citizens of

[3] Mr. Paige explained on redirect that, as a practical matter, he does not call for back up unless he encounters circumstances warranting such a call.

[4] In the *Jones* award, Arbitrator Schick, at footnote 7, reviewed testimony in that case indicating that a person who has access to an officer's gun holster still encounters a "double lock" before actually having access to the gun.

Philadelphia. As Arbitrator Schick stated in the *Jones* award, a case also dealing with an on duty sexual encounter, such conduct does harm to the reputation of the Police Department, and embarrasses not only the department, but the City. The notion that a police officer would not understand the serious nature of such misconduct is unthinkable.

I conclude that this evidence constitutes a "course of conduct" which shows that Mr. Paige had little or no regard for his duties as a police officer, and thus Mr. Paige is found in violation of Section 1.75 of the Disciplinary Code. I make this finding in spite of the fact that there are various allegations in the Notice of Dismissal which were not supported by testimony, and needed to be if the City intended to prove those aspects of its case.[5]

Though as I have indicated earlier it is not entirely clear in the Notice of Dismissal that the City was alleging a sexual assault, I do believe that the dismissal here was issued on that basis. Having found that there was no such sexual assault, then, I must next attempt to determine what penalty is appropriate under just cause principles for the course of conduct here, which included an on duty consensual sexual encounter.

The parties have provided me with two awards addressing the issue of on duty sexual encounters. In the first one, *FOP, Lodge 5 and City of*

[5] Specifically, the City produced no testimony explaining the specific manner in which Officer Paige failed to investigate properly, so that citations would be issued and the car confiscated under the Live Stop program. As to the MDT system, I have considered the notion that Mr. Paige began entering information, and actually stopped doing so due to the entreaties of [redacted] (and perhaps as some kind of *quid pro quo* arrangement). However, there is no testimony to rebut the fact that Mr. Paige attempted to log [redacted] information into the MDT system, but was unable to do so due to malfunction ([redacted] testimony actually supports Mr. Paige on that point, and Lieutenant Karcher confirmed that some of the information was entered, without commenting on whether his investigation concluded that there was, in fact, a malfunction). I therefore believe it would require speculation to conclude that Mr. Paige actually stopped entering the information, not due to a mechanical malfunction but due to the entreaties of [redacted]

Philadelphia, AAA Case No. 14 390 1117 94 W (*Mainardi*), Arbitrator Skonier considered a situation where a sergeant authorized the transfer of two females to a City-owned shed he had "reserved," for no reason having to do with police activity. The sergeant himself went to the shed and was in the shed for at least 20 minutes while on duty. The sergeant received oral sex from one of the women. While Arbitrator Skonier ultimately found that the actual sexual contact occurred while the officer was off duty, Arbitrator Skonier upheld the 30 day suspension under Section 1.75; [6] Section 4.15 (Failure to properly supervise subordinates); Section 4.20 (failure to comply with Commissioner's Orders, Directives, Regulations, etc., or any oral or written order of superiors) ;Section 4.50 (Failure to properly patrol beat or sector; unauthorized absence from assignment); and Section 5.15 (failure to follow department procedures for the handling of evidence, personal effects, and all other property taken into custody) due to the fact that he was in the shed socializing while on duty. Arbitrator Skonier further found that the demotion issued by the City was not supported by just cause.[7]

In the *Jones* award, discussed briefly above, Arbitrator Schick considered a situation where two officers had consensual sex with a woman, while on duty, and in a police car, after they had agreed to give her a ride home.

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[6] As Arbitrator Schick noted in the *Jones* award, in the *Mainardi* case Arbitrator Skonier was not called upon to specifically address the parameters for determining what constitutes a "course of conduct."

[7] In a related award, *FOP Lodge 5 and City of Philadelphia*, AAA Case No. 14 390 1351 94 (Arbitrator Lang, 1996) (*Drissel*), Arbitrator Lang upheld a thirty day suspension for the subordinate officer involved in the "shack" incident. In doing so, Arbitrator Lang found numerous violations of the Disciplinary Code, including a violation of Section 1.75. In that case, the City alleged, among other things, that the officer had transported two women to the shack and socialized with them rather than patrolling his sector. Though there is a reference in the opinion to "sexual accusations," the quoted parts of the Notice of Suspension do not directly allege an on duty sexual encounter, and while Arbitrator Lang suggests in the award that sexual activity likely occurred, there is no specific finding on that issue. As in the *Mainardi* award, Arbitrator Lang was not called upon to specifically address the parameters for determining what constitutes a "course of conduct."

The City had dismissed the officer, citing Section 4.50 of the Disciplinary Code (failure to properly patrol beat or sector; unauthorized absence from assignment; failure to respond to radio call; idle conversation or loafing); Section 5.39 of the Disciplinary Code (Unauthorized persons in police vehicle); and Section 1.75, already quoted above. In finding that the City lacked just cause to dismiss the officer, as stated above Arbitrator Schick concluded that the fact pattern presented was an isolated incident and therefore could not give rise to a "course of conduct" under Section 1.75. Arbitrator Schick reduced the penalty to a 10 day suspension, five days for the Section 4.50 violation and five days for the Section 5.39 violation.

While without a doubt the City has the right to determine the initial level of discipline, subject to whatever rights of review exist, including those existing under the parties' contract, once the City determines the initial discipline, a rather large imprint is made as to what level of discipline the City deemed appropriate for that particular alleged misconduct. Putting aside the ultimate results of the arbitration awards, the two cited arbitration awards demonstrate that the City has issued a thirty day suspension (plus demotion) in one case, and a dismissal in another, for misconduct which, in the City's view,[8] involved a sexual encounter while on duty.

While I might be persuaded by testimony from the Commissioner, or a designee with intimate knowledge of the decision-making process, as to why in this case dismissal is appropriate, as opposed to the 30 day suspension which was

[8] As stated earlier, in the *Mainardi* award Arbitrator Skonier ultimately found that the sexual conduct occurred off duty. The fact is, however, that the City, which took the position that the sexual conduct occurred on duty, did not find this conduct so offensive as to warrant dismissal.

issued in the *Mainardi* case, in the absence of such testimony it only seems fair to me to abide by the same penalty the City itself meted out in *Mainardi*.[9]

AWARD

The grievance is sustained in part and denied in part consistent with the foregoing opinion. The dismissal is reduced to a 30 day suspension. The City is ordered to offer the grievant immediate reinstatement to his former position as police officer. The City is further ordered to restore the grievant's full seniority, and to make the grievant whole for any loss of wages (minus the 30 day suspension), benefits, or other emoluments of employment flowing from the dismissal. The City is further ordered to adjust the grievant's personnel records to reflect the reduced discipline, and to remove reference to the dismissal.

Dated: March 30, 2009

Thomas G. McConnell

Thomas G. McConnell Jr.

[9] In the *Mainardi* case, the City also demoted the grievant, who was a sergeant. As stated above, Arbitrator Skonier found that this penalty was not supported by just cause.